**UNITED STATES DISTRICT COURT**

**DISTRICT OF CONNECTICUT**

| | | |
|---|---|---|
| CAROLINE O'BAR, | : | |
| Plaintiff, | : | |
| | : | |
| -vs- | : | Civ. No. 3:01cv867 (PCD) |
| | : | |
| BOROUGH OF NAUGATUCK, *et al.*, | : | |
| Defendants. | : | |

**RULINGS**

Presently before this court are plaintiff's motion for default judgment, plaintiff's motion to compel discovery and defendants' motion to dismiss. For the reasons set forth herein, the motion for default judgment is denied, the motion to compel discovery is granted in part and defendants motion to dismiss is granted in part as to defendant Stephen Hunt.

I. MOTION FOR DEFAULT JUDGMENT

Plaintiff moves for a default judgment against defendants Thomas Hunt and Stephen Hunt pursuant to FED. R. CIV. P. 55 for fail to file a pleading responsive to her amended complaint within twenty days as required by FED. R. CIV. P. 15(a).[1] Defendants filed a motion to dismiss[2] for lack of subject matter jurisdiction eight days after the filing of the amended complaint, which was denied without prejudice to refiling six days later for failure to comply with this Court's Supplemental Order.

---

[1] Plaintiff originally filed a motion for default for failure to file a responsive pleading to the original complaint. Defendants sought and were granted a number of extensions of time in which to file a response, at which point plaintiff amended her complaint and filed the present motion for default judgment.

[2] Defendants' motion to dismiss for lack of subject matter jurisdiction is entitled motion to strike. It will be construed as a motion to dismiss brought pursuant to FED. R. CIV. P. 12(b)(1).

Fifteen days after their motion was denied, defendants properly filed their motion.

Default enters against parties that "fail[] to plead or *otherwise defend*." FED. R. CIV. P. 55(a) (emphasis added). A motion to dismiss satisfies the "otherwise defend" requirement, thus default will not enter. *See Rudnicki v. Sullivan*, 189 F. Supp. 714, 715 (D. Mass. 1960). Defendants' filing of the motion to dismiss stays the requirement that they file a responsive pleading until ten days after issuance of a ruling on the motion. *See* FED. R. CIV. P. 12(a)(4)(A). Any argument that the aggregate nine-day delay in filing the motion to dismiss justifies issuance of a default judgment misapprehends the severity of the sanction and the strong "preference that litigation disputes be resolved on the merits, not by default." *Cody v. Mello*, 59 F.3d 13, 15 (2d Cir. 1995). The motions for default judgment are denied.

II. PLAINTIFF'S MOTION TO COMPEL ATTENDANCE OF DEFENDANTS AT DEPOSITIONS AND FOR SANCTIONS

Plaintiff seeks to compel the depositions of defendants Dennis Chisham, Thomas Hunt and Stephen Hunt. Plaintiff presently has noticed the depositions of defendant Dennis Chisham for March 4, 2002 and defendants Thomas Hunt and Stephen Hunt for March 7, 2002. By a February 8, 2002 ruling on defendant's motion for an extension of time, all parties are to complete discovery by March 29, 2002.

A party is obligated to attend a properly noticed deposition. *See Mercado v. Division of New York State Police*, 989 F. Supp. 521, 523-24 (S.D.N.Y. 1998). Failure to do so subjects the offending party to the full panoply of sanctions available under FED. R. CIV. P. 37(b), up to and including dismissal of the action. *See* FED. R. CIV. P. 37(d)(1). The alleged scheduling conflicts do not

manifest bad faith on the part of defendants in failing to attend the previously scheduled depositions such as to justify the more drastic sanctions available, and as plaintiff has failed to provide the necessary evidence for an award of attorneys' fees for defendants' failure to conform to the *Federal Rules of Civil Procedure*, no fees shall be awarded. *See Mercado*, 989 F. Supp. at 524. Although an order compelling a party's attendance at a properly noticed deposition is unnecessary pursuant to FED. R. CIV. P. 37(d)(1), as a measure to affirm defendants' obligations they are hereby ordered to attend the depositions as noticed on March 4, 2002 and March 7, 2002.[3] Plaintiff's motion to compel defendants' attendance at scheduled depositions is granted.[4]

III. DEFENDANTS' MOTION TO DISMISS

Defendants argue that plaintiff's failure to name defendants Thomas Hunt and Stephen Hunt in the complaint before the Connecticut Human Rights Organization ("CHRO") constitutes failure to exhaust administrative and the complaint against those defendants should be dismissed. Plaintiff responds that subject matter jurisdiction exists against the two defendants notwithstanding this deficiency.

**A. Background**

Plaintiff was a police officer for the Borough of Naugatuck from September 6, 1990, until

---

[3] As defendant Stephen Hunt was a party at the time plaintiff sought to depose him, he is ordered to attend the deposition as noticed notwithstanding the fact that he has since been dismissed as a party. This is in keeping with the authority of this Court to remedy such a failure by making "such orders in regard to the failure as are just." *See* FED. R. CIV. P. 37(d).

[4] Plaintiff also filed an objection to a motion for sanctions drafted by defendants for cancelling scheduled depositions and enclosed a copy of the same. This motion was not filed and is not properly before this court. It is, however, worth noting that sanctions generally are not available in the absence of a violation of a court order regulating discovery. *See Salahuddin v. Harris*, 782 F.2d 1127, 1133 (2d Cir. 1986).

January 27, 2001. Defendant Dennis Chisham is employed as the Chief of Police. Defendant Thomas Hunt is employed as the Deputy Chief of Police. Defendant Stephen Hunt is a Naugatuck Police Officer and the son of Thomas Hunt.

Plaintiff took maternity leave from on or about March 5, 1999 to June 3, 1999. She alleges that as a consequence of her taking this leave, from the date of her return through her filing a complaint with the CHRO, others with less seniority were selected over her for promotions and choice job assignments. She also alleges that defendants Chisham and Thomas Hunt ordered her evaluation changed to reflect more sick days taken than she actually took.

On January 24, 2000, she filed a pro se complaint with the CHRO against defendants the Borough of Naugatuck and Chisham for discrimination on the basis of her pregnancy and for retaliating against her for filing a grievance with the Police Commission. On April 13, 2000, her "Intent to Sue" letter was printed in the local newspaper. On April 9, 2001, the CHRO released its jurisdiction over the complaint. Plaintiff alleges that defendants discriminated against her on the basis of gender and that she was subjected to retaliation for reporting discrimination within the Naugatuck Police Department. Plaintiff then filed the present complaint alleging violations of the Family and Medical Leave Act of 1993, 29 U.S.C. § 2601 *et seq.*, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000 *et seq*. ("Title VII"), CONN. GEN. STAT. § 46a-60, and slander per se.

**B. Standard**

A motion to dismiss is properly granted when "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *In re Scholastic Corp. Sec. Litig.*, 252 F.3d 63, 69 (2d Cir. 2001) (internal quotation marks omitted). A motion to dismiss must

be decided on the facts as alleged in the complaint. *Merritt v. Shuttle, Inc.*, 245 F.3d 182, 186 (2d Cir. 2001). All facts in the complaint are assumed to be true and are considered in the light most favorable to the non-movant. *Manning v. Utilities Mut. Ins. Co., Inc.*, 254 F.3d 387, 390 n.1 (2d Cir. 2001).

**C. Discussion**

Defendants move to dismiss claims against defendants Thomas Hunt and Stephen Hunt arguing that there is no subject matter jurisdiction. Plaintiff responds that jurisdiction over the individual defendants is proper.

1. defendant Thomas Hunt

Defendants allege that the failure to name defendant Thomas Hunt in her complaint before the CHRO constitutes failure to exhaust administrative remedies.[5] Plaintiff responds that she was unaware of defendant Thomas Hunt's involvement until his involvement was made known during a CHRO hearing.

A plaintiff pursuing a Title VII claim must first file a complaint with the EEOC or responsible state agency naming the defendant. *Vital v. Interfaith Medical Center*, 168 F.3d 615, 619 (2d Cir. 1999); *Johnson v. Palma*, 931 F.2d 203, 209 (2d Cir. 1991). In deference to the *pro se* status of those filing complaints with such agencies, a "flexible stance" is taken in interpreting the procedural

---

[5] Defendants argue that plaintiff failed to exhaust her administrative remedies because the claims against defendant Thomas Hunt are not "reasonably related" to the claims against defendant Chisham. As defendants focus is on the fact that "plaintiff failed to name the defendants as Respondents in her original CHRO action," the argument is one of jurisdiction over unnamed parties, not of jurisdiction over unidentified claims, which would implicate the "reasonably related" standard. *See Butts v. City of N.Y. Dep't of Hous. Pres. & Dev.*, 990 F.2d 1397, 1401 (2d Cir. 1993).

provisions to avoid frustration of remedial goals. *Johnson*, 931 F.2d at 209. An exception to the rule that all defendants must be named in the complaint before the agency exists where there is "a clear identity of interest between the unnamed defendant and the party named in the administrative charge." *Id.* Such an identity of interests excusing the failure to name a defendant in a complaint is determined through consideration of (1) whether the role of the unnamed party could reasonably be ascertained at the time of the filing of the complaint; (2) whether the named party's interests are so similar to the unnamed party's that it would be unnecessary to include the unnamed party in the proceedings on the complaint to obtain voluntary conciliation and compliance; (3) whether the unnamed party's absence from the proceedings on the complaint resulted in actual prejudice to its interests; and (4) whether the unnamed party has represented to the plaintiff that its relationship with the plaintiff is to be through the named party. *Id.* at 209-10. No single factor of the four is decisive. *Donovan v. E. Milk Producers Coop. Ass'n*, 971 F. Supp. 674, 679 (N.D.N.Y. 1997).

A review of the facts as alleged leads to the conclusion that defendant Thomas Hunt, as the unnamed defendant, has an identity of interests with the named defendants. His role in changing her evaluation was identified at the hearing on her complaint, before which she was unaware of his involvement. Plaintiff, as a subordinate of Thomas Hunt, could not reasonably have ascertained his involvement in changing her evaluation prior to filing her complaint with the CHRO. Moreover, his interests are sufficiently similar to those of defendant Chisham as his immediate supervisor and part of plaintiff's chain-of-command. Based on his senior status in the department, it is likely he was aware of the complaint filed with the CHRO after its publication and from his contact with defendant Chisham. Defendants do not argue that any rights would be prejudiced by a determination that an identity of

interests exists.

The present facts are in no way comparable to those cases in which courts have failed to find an identity of interests. *See Vital*, 168 F.3d at 620; *Johnson*, 931 F.2d at 210 (plaintiff's knew of involvement of unnamed party at time of complaint, interests of named and unnamed parties were dissimilar, and unnamed party had no notice of complaint). The motion to dismiss claims against defendant Thomas Hunt is therefore denied.

2. defendant Stephen Hunt

Plaintiff's claim against Thomas Hunt is limited to an allegation of slander per se for spreading rumors in August 2000 that she, a married woman, was having an affair with a fellow officer. Defendants argue that no basis for the exercise of supplemental jurisdiction exists over the claim. Plaintiff responds that, as the slanderous remarks are part of a pattern of harassment, they are a proper basis for the exercise of supplemental jurisdiction.

Jurisdiction over the slander claim, as diversity jurisdiction is not present, must be sustained, if at all, through supplemental jurisdiction under 28 U.S.C. § 1367(a). Supplemental jurisdiction is appropriate "where the claim in question arises out of the same set of facts that give rise to an anchoring federal question claim against another party." *Kirschner v. Klemons*, 225 F.3d 227, 239 (2d Cir. 2000). Stated differently, do the claims share a "common nucleus of operative fact," such that plaintiff "would ordinarily be expected to try them all in one judicial proceeding." *United Mine Workers v. Gibbs*, 383 U.S. 715, 725, 86 S. Ct. 1130, 16 L. Ed. 2d 218 (1966)." As alleged, plaintiff claims only that during the relevant time period during which her employers discriminated and retaliated against her, her co-worker, defendant Stephen Hunt, spread

rumors about her. The mere fact that his conduct occurred during the relevant time period does not constitute the same nucleus of facts giving rise to the federal claims against the other defendants. *See Kirschner*, 225 F.3d at 239. The motion to dismiss the claim against Stephen Hunt is granted.

IV. CONCLUSION

Plaintiff's motions for default judgment (Docs. 12 and 29) are **denied**, plaintiff's motion to compel discovery and for sanctions (Doc. 56) is **granted in part** and defendants' motions to dismiss (Docs. 30 and 37) are **granted in part** as to defendant Stephen Hunt.

SO ORDERED.

Dated at New Haven, Connecticut, February ___, 2002.

_____

Peter C. Dorsey
United States District Judge